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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-110

STATE OF WISCONSIN, *Petitioner,*

v.

JONAS YODER, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

ADIN YUTZY, *Respondent.*

STATE OF WISCONSIN, *Petitioner,*

v.

WALLACE MILLER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. The Issue Is Not Whether The Amish Society's Way Of Life Measures Well Compared With Society's In General, But Rather Is: Whether Any Segment Of Society Under A Claim Of First Amendment Right May Decide For Itself That It May Refuse To Abide By Fundamental Standards That Society Has Developed And Established?

Respondents dwell, at length, upon the Amish way of life and upon its virtues. From this, respondents argue that it would not be against society's interest to grant an exemption to the particular segment of society here involved from society's compulsory school attendance law.

Respondents' argument ignores the fact that *if* an exemption is required for the segment of society involved in this case, it must be required legally for any segment of society (or all segments of society) that claim a conscientious belief that requires that adherence to society's minimum fundamental standards be ignored.

Respondents' argument also ignores the legal effect of the rule it seeks from this court under a claim of first amendment right, — that an exemption from society's compulsory school attendance law for two years is legally indistinguishable from an exemption for four years, or six, or more.

It is common knowledge that the curricula and methods of teaching are constantly subject to change. What the Amish object to as "worldly" in the ninth grade may next year be present in the curriculum or environment of the eighth grade, and the following year in the seventh grade.

The distinction between elementary and secondary schools is artificial and in some instances meaningless. It is only the Amish and the Wisconsin Supreme Court that seem to see a profound difference between eighth and ninth grade.

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary/1 long ago established that children could be required to attend school provided that they or their parents were not restricted in their choice to a public school. Respondents have made no effort to bring themselves under this protection offered by sending their children to private parochial schools.

This court first was confronted with this problem in cases involving the Morman religion. In *Reynolds v. United States* (1878), 98 U.S. 145, 25 L.Ed. 244, the court established the principle that while the right to believe is absolute, the right to act is not.

II. The State Is Not Required To Prove, In A Trial Involving A Violation Of Its Compulsory School Attendance Law, Sec. 118.15 (1), Wis. Stats., That Its Minimum Standards For Education Are Superior To The Standard The Accused Wishes To Pursue.

Respondents extol the merits of *their* way of life and the fact that *their* standards for education prepare their young for this way of life, and then argue that the State failed to prove, at the trial court level, that the State's compelling interest in education was superior to the rights of the Respondents.

This argument assumes that whenever society wishes to prosecute any person, or group of persons, for a violation of society's basic standards, that society must, as a matter of

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/1 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)

proof, show that its standards or minimum requirements are correct. We do not perceive this to be the law of the land.

If the standards are wrong, the legislature is the proper forum in which to seek relief.

Respondents rely heavily on that portion of the decision of the Wisconsin court which states that the "record filed fails to disclose a compelling interest in education."

This court has reiterated on numerous occasions the fundamental importance of education to society and the individual. *Brown I*/[2], *Board of Education v. Allen*/[3], *Everson v. Board of Education*/[4], *West Virginia v. Barnette*/[5].

Respondents and the Wisconsin Supreme Court misconceive the character and depth of analysis of the interests of society and the individual required in this instance. We believe the following from *Gillette v. United States*/[6] to be cogent to this issue:

> "Nonetheless, our analysis of § 6(j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.
>
> "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a

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/[2] Brown v. Board of Education of Topeka (1954), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

/[3] 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed. 2d 1060

/[4] 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947)

/[5] 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)

/[6] — U.S. —, 91 S.Ct. 828, 28 L.Ed. 168 (1971)

democratic government. See Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643 (1905); cf. Cleveland v. United States, 329 U.S. 14, 20, 67 S.Ct. 13, 16, 91 L.Ed. 12 (1946). To be sure, the Free Exercise Clause bars 'governmental regulation of religious *beliefs* as such,' Sherbert v. Verner, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed. 2d 965 (1963), or interference with the dissemination of religious ideas. See Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953); Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)."

In *Reynolds v. United States* (1878), 98 U.S. 145, 25 L.Ed. 244, this court announced that a segment of society could not, in the name of religious freedom under the First Amendment, avoid compliance with society's law prohibiting polygamy. In that case, society was not required to prove its interest in preserving monogamy. However, this court in reviewing the historical and social values involved, had no problem in recognizing society's interest.

It is difficult to perceive many concerns of society more fundamental and compelling than education. Man is a social being and society, because of that very fact, has an interest in the education of the young:

Mr. Justice White, in the recent case of *Lemon v. Kurtzman*[7] said, loc cite, 29 L.Ed. 2d 783:

> "It is our good fortune that the states of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental function,

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[7] 403 U.S. 602, 91 S.Ct. 2135, 29 L.Ed. 2d 745

and not only understood secular education as a public responsibility, but also required compulsory attendance at school by their young. . . ."

It is important to remember that society recognizes the fundamental importance of education and in deference thereto has promulgated certain basic standards concerning education.

III. The Doctrine In *Sherbert* Should Not Apply Because It Has Been Modified By More Recent Conscientious Objector Cases.

The danger of applying *Sherbert* is that it was apparently modified by *Seeger*/[8] and *Welsh*/[9]. In these later two cases, this court held that exemption from conscription could not be limited to persons citing religious beliefs but must be extended to any individual claiming a seriously held moral obligation. Thus, if *Sherbert* applies in this case, so do *Seeger* and *Welsh*, and any person may conscientiously and constitutionally object to education on religious *or* moral obligation grounds. Of course, such a rule would substantially frustrate society's compelling interest in educating its young.

Thus, what the Wisconsin decision has attempted to do is to establish an exemption for Amish alone based on religious grounds. The only manner in which such an exemption could possibly carry constitutional validity is if, by act of the legislature, it is applied to all persons who conscientiously object to education. Such a right does not exist without legislative fiat.

/[8] United States v. Seeger, 380 U.S. 163, 166, 173, 13 L.Ed. 2nd 733, 85 S.Ct. 850 (1965).

/[9] Welsh v. United States, 398 U.S. 333, 26 Fed. 308, 90 S.Ct. 1792 (1970).

IV. The Doctrine In *Sherbert* Does Not Apply Because Neither Children Nor A Compelling State Interest Were Involved In That Case.

As respondents stated at page 27 of their brief:

> "This Court, in *Sherbert v. Verner,* 374 U.S. 398 (1963), provided the test which state regulation which burdens the free exercise of religion must meet: such imposition must be justified by 'a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' *Id.* at 403.[21]"

Respondents wish to apply *Sherbert.* However, respondent fails to discern important factors that distinguish *Sherbert* from the case now at bar.

First, children were not involved in *Sherbert.* As this court recognized in *Prince v. Massachusetts* (1943), 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, at pages 165-166:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States,* 98 U.S. 145, 25 L. ed. 244; *Davis v. Beason* (1889), 133 U.S. 333, 33 L. ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by *requiring school attendance,* regulating or prohibiting the child's labor, and in many other ways. . . . (Emphasis added.)
>
> "* * *
>
> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment.

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. . . ."

Also, see *Ginsberg v. State of New York* (1968)/[10].

And in a subsequent case that applied *Sherbert, In re Jenison* (1963), 375 U.S. 14, children were not involved.

Further, we do not perceive that compulsion for jury duty *(Jenison)* or requiring willingness to work on certain specified days of the week in order to obtain unemployment benefits *(Sherbert)* has the compelling state interest that education does.

Respectfully submitted,

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/[10] Ginsberg v. State of New York (1968), 390 U.S. 629, 88A S.Ct. 1274, (rehearing denied) 20 Fed. 2d 195, 391 U.S. 971, 88 S.Ct. 2029.